No. 2748

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

COUNTY OF HAWAII,
Plaintiff in Error,

vs.

HALAWA PLANTATION, LIMITED
(a corporation),
Defendant in Error.

SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR.

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SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR.

The oral argument before this Court on behalf of plaintiff in error in the above-entitled matter, involved, so far as the question of liability of counties in Hawaii is concerned, the following contentions:

1. That the decision of the Supreme Court of Hawaii should not be accorded controlling weight in this Court in the case at bar.

2. That it has been established by an almost uniform line of decisions in the United States, that counties are not liable for the misfeasance of their officers or employees, nor for their nonfeasance, except where a duty has been specifically imposed.

The reason being that counties are but agents or instrumentalities of the State, or general government, created for its convenience and assistance.

3. That counties in Hawaii are essentially agents or instrumentalities of the territorial government and particularly susceptible to the foregoing reasons.

4. That even if counties in Hawaii are only municipal corporations proper, still the care of their highways is a strictly governmental function, and that even municipalities are not liable for injuries occurring in the performance of governmental, as distinguished from the exercise of corporate or local powers.

5. That the facts of the present case distinguish it from the Matsumura case, as shown in our original brief (pp. 13 et seq.) and Michigan cases there cited.

The first of the foregoing propositions was not touched upon in the original brief of plaintiff in error, as the argument in favor of the controlling effect of the Matsumura case, with the allied contention for the effect to be given to the alleged acquiescence of the Legislature in that decision, was first raised in the brief of defendant in error.

The nature of the Hawaiian county, as shown by the Organic Act, the County Act, and the expression of the Hawaiian courts, was but slightly touched upon in our original brief. It is understood that the scope of the supplemental brief is limited to these two phases of the discussion.

FORCE OF MATSUMURA CASE.

The facts of the Matsumura case are stated on page 12 of our original brief. The opinion in the Matsumura case embodies the following discussion:

1. Would a municipal corporation be liable upon the facts stated?

2. If a municipal corporation would be liable, is defendant exempt because it is a county?

These questions a majority of the Court answered as follows:

(a) A municipal corporation would be liable because the act complained of was a direct invasion of a private right and for such an invasion an action will lie whether the work was governmental or corporate.

(b) The attempted distinction between counties and municipalities proper, made by most courts, is without basis in principle or reason, having its roots in Russel v. Men of Devon County, a case not applicable to the modern county even when the latter is of the simplest corporate type.

To sustain the distinction, Courts later resorted to the argument that counties are governmental agencies, while municipal corporations proper are largely of local activity and use—a baseless distinction.

(c) Still less is the historical origin, or later development of the doctrine, applicable to Ha-

waiian counties, which bear little resemblance to the counties of the various States, and cannot upon examination of their functions be considered governmental agencies, so that the extension of immunity to Hawaii, would be merely a blind adherence to a principle which is itself erroneous and born of fallacy.

The brief of defendant in error (pp. 20 et seq.) maintains that this decision should be held of controlling effect, and cites a number of cases from the Federal Courts to sustain the contention. As stated in our oral argument, however, these cases have hardly the slightest application to the present case, but are concerned with the effect given by Federal Courts to the decisions of State Courts whose jurisdiction embraces the same territory.

For guidance in the case at bar we must go to a case like Kealoha v. Castle, 210 U. S. 149 (52 Lawyer's Edition, 998), which was in brief as follows:

The Supreme Court of Hawaii in 1880, long prior to annexation, had held that a statute legitimating children born out of wedlock, whose parents afterwards intermarried, did not apply to offspring of adulterous intercourse. Twenty-eight years after this, and long after annexation, the Supreme Court of Hawaii, followed this construction of the local statute, and the Supreme Court of the United States refused to disturb this construction, irrespective of the conflict among Courts upon the principles involved. But as to statutes

and decisions subsequent to annexation, the Court said:

> "In the case of a law adopted by an organized territory of the United States at a time when it was subject to the control of Congress, the rule is that we will lean towards the interpretation of a local statute adopted by the local courts."

This is probably the statement most applicable to the present matter to be found in the decisions of the Supreme Court of the United States on cases coming from the Territory of Hawaii. Others to which brief reference may be made are the following: The construction was sustained given by the Supreme Court of Hawaii to statutes relating to exceptions, and to the question whether an order upon determination of such exceptions was a final judgment for which a writ of error could be taken to the Supreme Court of the United States. Purely a question of statutes of local procedure.

> Cotton v. Hawaii, 211 U. S. 162 (53 Lawyer's Ed. 131).

In the following case the Court held that it should give great weight to a decision of the Supreme Court of Hawaii concerning the powers of an earlier tribunal (the Land Commission of 1845) and involving obscure local history.

> Lewers & Cook v. Atcherly, 222 U. S. 285 (56 Lawyer's Ed. 202).

The construction given by the Supreme Court of the Territory of Hawaii, to a will written in the

Hawaiian language, was sustained as against the construction given by the Federal Court of the Territory. Also a holding that former probate proceedings had been in order was sustained as being a matter peculiarly for local determination.

> Ii Est. v. Brown, 235 U. S. 342 (59 Lawyer's Ed. 259).

In the following case it was held that the Federal Supreme Court will ordinarily defer to the rulings of the local Courts with respect to the validity under Hawaiian laws of a judgment of the Hawaiian Courts. The decision of the Supreme Court of Hawaii, however, was reversed on a proposition of general law.

> Kapiolani Est. v. Atcherly, 238 U. S. 116 (59 Lawyer's Ed. 1229).

FAILURE OF LEGISLATURE TO ACT.

An addendum to the brief of defendant in error lays stress upon the inference drawn by the Supreme Court of Hawaii in its decision (Transcript of record, p. 304), to the failure of the Legislature to enact a statute adopting a rule different from that laid down in the Matsumura case. This introduces a question not free from difficulty, and brings us from a consideration of fact and positive law into the rather shadowy realm of inference. Defendant in error cites 26 A. & E. 167, which says:

> "The Courts are extremely reluctant to reverse a decision construing a statute where the

> construction has in any manner received the sanction of the Legislature. Where the amendment of the statute leaves unchanged a section of the statute, which has been construed by the Court of last resort in the State, it will be presumed that the Legislature in the new law, intended to adopt the construction placed upon this section by the Court. Also a decision will be adhered to where a Legislature in revising the statute laws of the State, has not seen fit to change the statute construed."

For example, in Grubbs v. State, 24 Ind. 295, which was a prosecution for violating an act regulating foreign insurance companies, which had previously been held void for various reasons and not subsequently corrected by the Legislature through several sessions, the Court said:

> "We ought to proceed with great caution in reversing opinions hereofore pronounced by this Court and received and acted upon as settling the law, and especially where a rule of property would be overturned, and that would be made criminal which before had been adjudged lawful."

None of which reasons are applicable to the case at bar.

In the following case the Court held that a construction placed by the Court upon the words "actually settled" in a statute relating to settlement on school lands, should be followed, the Legislature having subsequently re-enacted the statute with the same words.

Hall v. White, 94 Tex. 452.

(Which also involves a set of facts not applicable to the present case.)

A similar principle was adhered to in limiting the liability of an administrator's bond in Flannery v. Givens, Administrator, 52 S. W. 962.

These cases involve some affirmative act of the Legislature, conformable to the decisions of the Courts, but we have to do in the present case with a failure upon the part of the Legislature to act.

In a note to 36 Cyc. 1143 (referred to by defendant in error in addendum to brief), the case of McChesy v. Hagar is cited to the effect that acquiescence by the Legislature in a construction by the executive or judiciary, is evidence that such construction is in accordance with the legislative intent. This was a case in which a previous judicial construction of a statute providing for salary of a public officer, had not resulted in any legislative action changing the statute although four Legislatures had met. It was held that if the Legislature had not intended this construction originally, it would have so declared itself and specifically have granted the officer the salary now claimed.

The Court in the above case may have been correct in arriving at the conclusion that the later Legislature did not intend to give the officer any more salary than the Court had construed the law as giving him, but we do not admit that one Legislature can interpret what another Legislature meant, any more than a witness on the stand can tell what another man meant when the latter's words are ambiguous.

In Bingham v. Board of Supervisors of Winona County, 8 Minn. 390, a question of fees claimed by a county treasurer, it was contended that the Legislature by an act subsequent to the one under which plaintiff claimed his fees, had construed the former act as authorizing the amount claimed. The Court said:

> "It is only the intent of the Legislature which enacts a statute that is to govern Courts in the construction thereof. The opinion of a subsequent Legislature upon the meaning of a statute, is entitled to no more weight than that of the same men in a private capacity."

In the following case the Court said:

> "The doctrine of legislative construction is a delicate one. It is an argument frequently of great force * * * and often a controlling principle in the construction of statutes, not because the Legislature has any power, even in terms, to declare the interpretation of a previous statute, but because if the Courts have called attention to a defect or an omission, and it be supplied by the Legislature, there is a fact in the history of legislation from which the Courts may reasonably infer the intent of the law-making power."
>
> Fidelity Trust Co. v. Gill Car Co., 25 Fed. 737.

It is true that a statute may be construed in the form of another statute subsequently passed, although this is really in essence new legislation and cannot affect past transactions.

Stebbins v. Pueblo County, 4 Fed. 282.

If then an affirmative legislative attempt in express terms to construe the act of a former Legislature, can be construed to be at most but a present enactment governing the future, it would seem that mere failure to do anything can hardly be considered as having much significance except that successive Legislatures have taken no interest in the matter, which is not particularly strange, as it is a fact of which Courts may almost take judicial notice that the important things in which Legislatures fail to take any interest are practically beyond computation.

Even assuming, however, that the failure of the Legislature to act, when action is possible, is an acquiescence in the judicial construction, and that such acquiescence is controlling in a subsequent case upon a Court higher than the one that gave the construction originally, let us stop for a moment and see what action on the part of the Legislature has been possible.

If the Legislature had acted, it must have done one of two things: either have declared that it was the intent of the Legislature creating counties, that they should not be liable for the tortious invasion of a private right, or on the other hand have amended the county law by enacting that thereafter no individual thus damaged should have a right of action therefor against a county.

Now, the first of the above-mentioned courses was not open to the Legislature, not only for the reason heretofore given, that it is not competent for

one Legislature to declare what some preceding Legislature meant, but for the still more powerful reason that it would be putting upon the act a construction contrary to that of the Court, which had already held in effect that the Legislature intended that counties should be liable, and whatever may be the powers of legislative construction, they do not extend that far, for "after all", to quote from the same volume and page of Cyc., to which the defendant in error has referred this Court:

> "It must be remembered that the Courts are the final arbiters as to the practical construction of statutes, and in discharging this important function they are at liberty to disregard legislative construction which in their judgment is not a correct exposition of the original act."

If, on the other hand, we suppose the Legislature to have specifically granted future immunity for invasion of private rights, we have it taking away from the individual his constitutional rights of redress against an organization or body, which the Courts have already declared to be in its nature no more exempt than an individual or a private corporation.

It is true that legislation exempting municipalities to a limited degree, from the negligence of their officers or employees, has been held constitutional, but not to the extent of granting immunity for a direct injury or invasion of a private right. As for example, in Vincent v. Brooklyn, 31 Hun 122, where it was held that a statute providing that

an action for negligence of the city council, or its employees, should only be maintained against the persons causing the injury, could not be construed as exempting the city from liability for death from an explosion of illuminating gas, caused by the negligence of the keeper of the municipal building.

Other cases which are sometimes cited as to the effect of acts exempting municipalities from liability are the following:

For example, it was held in O'Hara v. City of Portland, 3 Oregon 325, that an act exempting the city from liability for defects in streets, was not unconstitutional, as violating the provision that no law impairing the obligation of contracts shall be ever passed. The Court said quite pertinently:

> "How this amendment of the charter violates this provision of the Constitution, we are unable to see."

Such a contention, of course, would have no application to the present case.

In Duncan v. Lynchburg (Va.) 34 S. E. 964, it was held that a city empowered to co-operate with a county in roadwork, could properly be exempted from liability, as counties are in Virginia, the work being governmental in its nature. It is, of course, quite a different proposition from a contention that the Legislature could constitutionally exempt from liability a body such as the Court in the Matsumura case held that the County of Hawaii was.

On the whole, then, it would seem doubtful whether the Legislature, if it created what the Court in the Matsumura case said it had created, could have avoided the effect of that decision except by starting in all over and creating something entirely different, and this it could hardly be expected to do, at least until the present counties had tested their liability and been ruled against in the highest Court to which they have access, which is at the present time the Circuit Court of Appeals.

NATURE OF COUNTIES IN HAWAII.

It was provided by Section 56 of the Organic Act, that "the Legislature may create counties, and town and city municipalities". It is to be presumed that Congress had in mind counties as they exist in the United States, with their powers and limitations of liability as instruments of government; also, that the Legislature in creating counties intended to create what the Congress authorized them to create. We may also note that Section 56, by the use of the terms "counties", and "town and city municipalities" evidently intended a distinction.

In Castle v. Secretary of the Territory, 16 Hawaii, 769, where it was contended that the County Act was invalid as being in conflict with the Organic Act, and as delegating to county officers powers reserved by that act to territorial officers, it was said by the Court (p. 780):

> "Further considering the objections presented to the county act, it is to be observed that a county is an agent or instrumentality of the State or Territory, and has only such powers as are granted by the statute creating it."

For a judicial expression of the Supreme Court of the Territory subsequent to the Organic Act, and prior to the act creating counties, the Court's attention is called to pages 19 and 20 of our original brief, and to the citation therein made from the case of Coffield v. Territory, 13 Haw. 478.

The Court is further referred to the expressions used by the Supreme Court of the Territory, in characterizing the counties which had been created by the Legislature as quasi municipal corporations and as agencies or instrumentalities of the general government.

> Kanealii v. Hardy, 17 Haw. 9 (10 and 14);
> Territory of Hawaii ex rel County of Oahu v. Whitney, 17 Haw. 174 (175, 176, 177, 180 and 181).

Further examining the nature of counties in Hawaii as disclosed by the provisions of the County Act itself and by the previous nature of the Government of Hawaii, we find that the power of the counties over roads, bridges, water, lights, fire, sewers and police, are simply the powers exercised formerly by the central government, first under the monarchy, afterwards under the provisional government, later by the Republic of Hawaii and finally by the Territory of Hawaii, up to the time when

counties were created. The government has always been extremely centralized even to minute details, and counties were created particularly to enable the government to throw off upon these local instrumentalities a portion of its responsibilities.

Supervision was retained in the central government, even over many of the matters which were entrusted in a general way to the counties. For example, the Superintendent of Public Works had much authority with respect to roads (See Paragraph 3, Section 9 of the County Act and also Revised Laws 1905, Section 594) which charges him with the execution of all duties relative thereto. It is true that by an amendment in 1907, his powers of supervision were somewhat lessened, but this in no way affects the principle involved in the creation of the counties.

The County Auditor is required to keep his books in accordance with the instructions of the Auditor of the Territory. The County Attorney is made by the County Act a deputy of the Attorney-General of the Territory. The members of the Boards of Supervisors, although elected by the citizens of the county, and although charges may be filed against them by citizens, may only be removed by the Supreme Court of the Territory, and vacancies thus made may only be filled by the Governor of the Territory (Sec. 60 of the County Act).

The counties have no powers of taxation and no taxation officers. The County Act originally provided for tax assessors and collectors (Secs.

87 and 88) but these provisions were repealed by a later act at the same session of the Legislature (Act 54, 1905).

See also County of Kauai v. Holt, 17 Haw. 146 (148).

The taxes of the Territory of Hawaii are road, poll, school, property and income. Not a dollar of any of this is collected by or paid to any county. They are all paid into the territorial treasury. The road taxes, by a provision of general law, are spent in the districts from which they come. These districts are geographical divisions independent of the County Act and long antedating it. The property and income taxes are distributed according to plans which are changed from time to time, but which are under the supervision and control of territorial and county officers.

In matters of police, the counties took over work hitherto handled by the Territory. The supervision of police matters throughout the Territory had been previously handled to the minutest detail by the territorial government. There were no local police in the proper sense of the word. Section 67 of the County Act provides that the sheriff of each county shall exercise such powers and perform all the duties hitherto exercised and performed by the high sheriff of the Territory.

If counties are anywhere government agencies and instrumentalities, they are so in the Territory of Hawaii. As to this matter, the Court's atten-

tion is further called to the dissenting opinion of Mr. Justice Wilder in the Matsumura case.

For the reasons herein set forth, in addition to those maintained in our original brief, and in the oral argument presented to this Court, it is again maintained that the judgment heretofore rendered on behalf of the defendant in error should be reversed.

Respectfully submitted,

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Attorney for Plaintiff in Error.